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In The Supreme Court of the United States

UNITED STATES SHOE CORPORATION, PETITIONER,

V.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

Amicus curiae Federal Circuit Bar Association ("FCBA")[1] is a national organization comprising approximately 2,400 attorneys whose practice concerns the United States Court of Appeals for the Federal Circuit ("Federal Circuit") in all aspects of its jurisdiction. The FCBA offers a forum for common concerns and dialogue between the bar and the judges of the Federal Circuit. One of the purposes of the FCBA is to offer assistance and advice to the federal courts, including filing *amicus curiae* briefs on matters affecting practice before the Federal Circuit and lower tribunals. This brief reflects the judgment of FCBA members reached in the exercise of their profession and is offered solely to assist this Court in determining whether to grant *certiorari* in this matter.

SUMMARY OF ARGUMENT

As a result of the Federal Circuit's decision in *United States Shoe Corp. v. United States*, 296 F.3d 1378 (Fed. Cir. 2002) ("*U.S. Shoe II*"), there is currently a three-way split among the circuits as to how interest should be calculated on refunds of

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for Petitioner United States Shoe Corporation ("U.S. Shoe") has filed a global consent to the submission of *amicus* briefs in support of either party, which is on file with the Clerk. Respondent's letter consenting to the filing of this brief accompanies this filing.

unconstitutionally exacted monies. In *Henkels v. Sutherland*, 271 U.S. 298 (1926), this Court held that proceeds actually earned by the Government on money it exacted unlawfully are not interest for purposes of governmental immunity. The Ninth Circuit held that parties who are entitled to a refund from the Government should receive the lost time-value of the money. The United States Court of Federal Claims, however, reasoned that the actual proceeds the Government earned on the money should be refunded. In *U.S. Shoe II*, the Federal Circuit flatly contradicted *Henkels* and ruled that the Government does not owe parties anything outside of the principal.

There is also a conflict among the circuits as to whether the no interest rule applies where the Government has earned interest on unlawfully (or, in this case, unconstitutionally) exacted monies. The Sixth and Ninth Circuits have held that, when the United States seizes money unlawfully, the Government must repay that money with interest. In contrast, the First, Second, Eighth and Tenth Circuits have held that the no interest rule of *Library of Congress v. Shaw*, 478 U.S. 310 (1986), prevents plaintiffs from receiving interest on refunded money. Although Congress seems to have resolved the split in the forfeiture context, the split among the circuits continues in non-forfeiture contexts like *U.S. Shoe II*.

Finally, the decision by the Federal Circuit narrowly read this Court's opinion in *Shaw* to waive sovereign immunity for payments of interest by the

Government only for unconstitutional acts involving the Takings Clause of the U.S. Constitution. This Court, however, has never stated that the only constitutional provision that waives sovereign immunity for payments of interest by the Government is the Takings Clause. To the contrary, *dicta* in decisions of this Court indicate that the opposite is true, that is, constitutional provisions other than the Takings Clause waive the Government's sovereign immunity.

For the foregoing reasons, a*micus curiae* respectfully requests this Court to grant the petition for writ of *certiorari* to clarify the existing state of the law and resolve the existing conflicts in the interpretations of the law.

ARGUMENT

I. THE PETITION FOR WRIT OF *CERTIORARI* SHOULD BE GRANTED BECAUSE, AS A RESULT OF THE FEDERAL CIRCUIT'S DECISION, THERE CURRENTLY EXISTS A CONFLICT AMONG THE CIRCUITS AS TO HOW INTEREST SHOULD BE CALCULATED ON REFUNDS OF UNCONSTITUTIONALLY EXACTED MONIES

Traditionally, the rule in the United States has been that the Government, as a sovereign, need not pay the lost time-value of money it illegally exacted from taxpayers, unless a statute, a contract, or the U.S. Constitution provides otherwise. *Shaw*, 478

U.S. at 314-17. This rule, however, does not affect the obligation of the Government to pay to the taxpayer any income the Government derived, actually or constructively, while it was holding the illegally exacted money.

This Court ruled that proceeds actually earned by the Government on money it exacted unlawfully are not "interest" for purposes of governmental immunity. *Henkels*, 271 U.S. at 300-02. In *Henkels*, the Government mistakenly seized shares of stock belonging to *Henkels*, sold the stock, and commingled the money it received from the sale with other funds. The Government then deposited the commingled funds in interest-bearing securities. The Government refunded the principal to Henkels, but claimed immunity from refunding the interest. This Court rejected that argument, stating: "[T]he claim here is not for interest to be paid by the United States in the sense of the rule [of immunity from interest]. It is for income, derived from an investment of Henkels' money in obligations of the United States, which income has been actually received by the Treasury and is in its possession." *Id.* at 301.

The situation presented in *U.S. Shoe II* is like the one presented in *Henkels*. In both cases, the Government took money unlawfully, commingled the taken money with other funds, invested the commingled funds in interest-bearing instruments, and ultimately claimed the right to withhold a refund of the interest by invoking governmental immunity. This Court's decision in *Shaw*, which

addressed the lost time-value of monies, did not affect this Court's holding in *Henkels*, which continues to be the primary case on when income earned on unlawfully exacted monies must be refunded by the Government.

Subsequently, the predecessor of the United States Court of Federal Claims[2] applied the analysis in *Henkels* to distinguish governmental retention of actual proceeds — which is not covered by the no interest rule — from "lost time-value" of money, which, it held, is covered by the rule. *See Bonnar v. United States*, 438 F.2d 540, 572 (Ct. Cl. 1971). In *Bonnar*, as in *Henkels*, the Government unlawfully seized shares of stock pursuant to the Trading With the Enemy Act, then sold the stock and kept the money from the sale. Unlike in *Henkels*, however, the Government did not actually earn interest on the money it gained from selling Bonnar's stock: "So far as the record in this case discloses, * * * no *Henkels* situation exists" because "the funds are in the account and are not accruing any interest, income, or economic benefit to the Alien Property Custodian." *Bonnar*, 438 F.2d at 572.

The Sixth and Ninth Circuits rejected the reasoning of *Bonnar*. *See United States v. $515,060.42,* 152 F.3d 491 (6th Cir. 1998); *United States v. $277,000,* 69 F.3d 1491 (9th Cir. 1995). In *$515,060.42* and in *$277,000*, the Government

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[2] When *Bonnar* was originally decided, the court was referred to as the Court of Claims. In 1982, the court was renamed the United States Claims Court, and, as of 1992, the official name is the United States Court of Federal Claims.

unlawfully seized money and deposited it into a Treasury account. The court of appeals lacked sufficient evidence in each case to determine whether the money had actually earned interest in the account. *$515,060.42*, 152 F.3d at 505; *$277,000*, 69 F.3d at 1494-95.

The Sixth Circuit remanded the action before it for a determination of whether interest was actually earned to decide the method of calculating damages. *$515,060.42*, 152 F.3d at 505-06. The Sixth Circuit held that, if interest had been earned by the Government, it must be disgorged; whereas, if no interest had been earned, the Government owed constructive interest calculated at the alternative borrowing rate. *Id.*

In *$277,000*, the Ninth Circuit ruled that "whatever the formal status of the funds, * * * it is clear that the translation of the cash from sterile paper into a deposit fund in fact redounds to the direct benefit of the federal government, in a manner that is completely equivalent to the earning of interest." *$277,000* 69 F.3d at 1495. The court concluded:

> Thus, we hold that to the extent the funds were deposited in the Treasury as of June 1987, those funds should be considered as constructively earning interest at the government's alternative borrowing rate at all times from then until the rendering of judgment in this case. Such amounts, in accordance with the judge's order and past

> practice, become part of the *res*, to be returned with the *res* to the claimant.

Id. at 1496.

The manner in which the predecessor of the United States Court of Federal Claims in *Bonnar* interpreted *Henkels* makes it clear that if that court were deciding *$515,060.42* or *$277,000*, it would examine whether interest was actually earned and would deny any interest if the answer were no. In its *U.S. Shoe II* decision, the Federal Circuit reached a decision that conflicts with decisions of both the Sixth and Ninth Circuits and the court in *Bonnar*. According to the reasoning of *$277,000* and *$515,060.42*, exporters like U.S. Shoe should receive the lost time-value of their collective monies — estimated at approximately $700 million by Petitioner. According to the reasoning of *Bonnar*, exporters like Petitioner U.S. Shoe should receive the actual proceeds the Government earned on its investment of their collective monies — estimated at approximately $70 million by Petitioner. But the Federal Circuit, in *U.S. Shoe II,* ruled that the Government owes the exporters nothing. That ruling flatly contradicts *Henkels* and creates a three-way split of authority on the correct approach to awarding interest on refunds of unlawfully, and, in *U.S. Shoe II,* unconstitutionally, exacted monies. This Court should grant the petition for writ of *certiorari* to resolve this conflict.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THERE CURRENTLY EXISTS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE NO INTEREST RULE APPLIES WHERE THE GOVERNMENT HAS EARNED INTEREST ON UNCONSTITUTIONALLY EXACTED MONIES.

Six federal circuit courts have addressed the applicability of the no interest rule to unlawful confiscations of money by the Government. Two of the circuits have come to the conclusion that the no interest rule is not applicable, while four circuits have reached the opposite conclusion. In 2000, the Tenth Circuit noted what, at that time, was a two-to-two circuit split:

> [T]he circuits are split on whether the government can be ordered to pay interest when it must return seized property to a claimant following an unsuccessful forfeiture action. The Eighth and Second Circuits hold that sovereign immunity bars an award of interest since the government has not waived its immunity from suit in this respect. While acknowledging there is no relevant waiver of sovereign immunity, the Ninth and Sixth Circuits view the matter not as an award of interest, but as the government's duty to disgorge property, earned while the seized *res* was in the government's hands, that was not forfeited.

United States v. $30,006.25, 236 F.3d 610, 613 (10th Cir. 2000).

The Ninth and Sixth Circuits have held, in the context of a civil forfeiture, that, when the United States seizes money unlawfully, the Government must repay the money with any interest that was, or should have been, earned on the money. *$277,000*, 69 F.3d at 1491; *$515,060.42*, 152 F.3d at 504-06. In *$277,000*, the Ninth Circuit stated that the no interest rule is inapplicable because the plaintiff is not requesting interest, but merely what the money seized has become:

> The action of the court below in stating that the interest earned on the money in an interest-bearing account would become part of, and would be substituted for (along with the original amount) the *res* itself is fully in accord with common sense. If the government seized, for example, a pregnant cow and was ultimately found not to be entitled to the cow after it had given birth, it could hardly be contended that the government had fulfilled its duty by returning the now-barren cow, but retaining the calf.

$277,000, 69 F.3d at 1496.

The Ninth Circuit also distinguished the situation where the Government has decreased the value of unlawfully seized property while it was in the Government's possession:

> By contrast, in our case there is in fact a benefit from the use of the money, which must be allocated either to the government or the claimant. There is no element here of forcing the government to pay for damage it has done, only that it must disgorge benefits that it has actually and calculably received from an asset that it has been holding improperly.

Id.

The Ninth Circuit adhered to *$277,000* in *United States v. $133,735.30*, 139 F.3d 729, 731-32 (9th Cir. 1998), ruling that, when the Government deposits unlawfully seized funds in an interest-bearing account, the Government must pay the wronged party the actual interest accrued on those funds. *Id.* The court explained that, in *$277,000*, the United States was obligated to pay interest at the Government's alternative borrowing rate only because it had not deposited the seized money in an interest-bearing account. *Id.* In addition, a district court within the jurisdiction of the Ninth Circuit followed *$277,000*, requiring the Government to pay pre-judgment interest on money unlawfully seized in a forfeiture action: "The United States as trustee of the forfeited funds may not retain the interest actually or constructively earned on the forfeited funds." *United States v. Chan*, 22 F. Supp.2d 1123, 1127 (D. Haw. 1998).

In *$515,060.42*, the Sixth Circuit addressed facts virtually identical to those in *$277,000*. Taking

guidance also from the Ninth Circuit's decision in *$133,735.30*, the Sixth Circuit explained that, on remand, the district court should calculate interest in a manner determined by whether the Government had actually earned interest on the seized money. *$515,060.42*, 152 F.3d at 505-06. If no interest had been earned, "the seized funds should be treated as constructively earning interest at the Government's alternative borrowing rate at all times until the rendering of judgment. Such amounts become part of the *res*, to be returned with the *res* to claimants." *Id.* at 505. If the Government had earned interest, "the Government satisfies its burden to disgorge the benefit that it has received from the use of a claimant's property by turning over the interest actually earned on the seized funds." *Id.* at 505-06.

In addition, a district court within the jurisdiction of the Sixth Circuit relied upon *$515,060.42* in awarding interest to a company that had overpaid $3.5 million in taxes. *E. W. Scripps Co. v. United States*, 2002 U.S. Dist. LEXIS 20283 (S.D. Ohio Sept. 16, 2002). The court ruled that the statute waiving immunity from interest in cases of tax overpayments authorizes a lawsuit for interest even if the Government has already refunded the principal. It reasoned that interest is part of the principal, citing the "pregnant cow" analogy of *$515,060.42*. *Id.* at *12-*13. This case goes beyond the forfeiture context of the Sixth and Ninth Circuit cases.

Unlike the Sixth and Ninth Circuits, the First, Second, Eighth, and Tenth Circuits have all held that the no interest rule of *Shaw* prevents plaintiffs

from collecting interest on money seized in forfeiture cases. *Larson v. United States*, 274 F.3d 643 (1st Cir. 2001); *United States* v. *$30,006.25*, 236 F.3d 610, 614-15 (10th Cir. 2000); *United States* v. *$7,990.00*, 170 F.3d 843, 845-46 (8th Cir. 1999); *Ikelionwu v. United States*, 150 F.3d 233, 238-39 (2d Cir. 1998). These courts take the view that proceeds earned on the seized money are "interest" *per se* and cannot be transformed into something else by mere re-naming. The Tenth Circuit reasoned: "We cannot agree with the Ninth and Sixth Circuits that recharacterizing an interest award as a disgorgement of profits circumvents the effect of sovereign immunity." *$30,006.25*, 236 F.3d at 613. The First Circuit used the same rationale:

> As the Supreme Court made clear in *Shaw*, "courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy." *Shaw*, 478 U.S. at 321. This Court went on to caution in Shaw that "the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution." *Id.* at 321. In characterizing such claims not as "pre-judgment interest," but as "profit from wrongly seized property," the Ninth Circuit can be said simply to have devised "a new name for an old institution." *$277,000 U.S. Currency*, 69 F.3d at 1493.

Larson, 274 F.3d at 647. The Eighth Circuit reasoned similarly: "[T]he no-interest rule [cannot] be dismissed by labeling the award * * * constructive

interest, or compensation for * * * loss of use of the property — 'the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution.'" *$7,990.00*, 170 F.3d at 845 (quoting *Shaw*, 478 U.S. at 321). The Second Circuit made no mention of the contrary holdings of the Sixth and Ninth Circuits, even though both of those holdings pre-dated the Second Circuit's decision. Instead, the court rejected the claim of entitlement to interest because: "Absent 'express Congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award.' There is no statutory basis for awarding prejudgment interest in this case." *Ikelionwu*, 150 F.3d at 239 (quoting *Shaw*, 478 U.S. at 314).

U.S. Shoe II presents the same issue as the one causing the split, even though it is not a forfeiture action. Like the forfeiture cases, *U.S. Shoe II* involves "benefits that [the United States] has actually and calculably received from an asset that it has been holding improperly." *$277,000*, 69 F.3d at 1498. The United States unconstitutionally took possession of the HMT export payments, held those payments in the Harbor Maintenance Trust Fund, and now enjoys the benefit of the interest earned on those payments. There is no dispute that: (a) the tax on exports was unconstitutional; (b) the Government has actually benefited from improperly taking and holding the money (and the exporter's have suffered by not having had benefit of the monies unconstitutionally exacted); and (c) the benefit is calculable. Nothing in the reasoning of any of the

circuit court cases is confined to forfeiture actions; instead, their reasoning applies as clearly to *U.S. Shoe II* as it does to cases of forfeiture. Both situations involve unlawful confiscations of money by the Government.

Because the circuits' reasoning applies to unlawful confiscations generally, U.S. Shoe would have been entitled to interest in the Sixth and Ninth Circuits, but would not have received interest in the First, Second, Eighth, and Tenth Circuits, even after the enactment of the new forfeiture statute by Congress. *See $30,000.25*, 236 F.3d at 613 (referencing the Civil Asset Forfeiture Reform Act of 2000, codified at 28 U.S.C. § 2465(b)(1)(C)). That statute does not resolve the split as it relates to U.S. Shoe. Outside of forfeiture actions, the split will continue whenever the Government unlawfully collects money from private citizens. This Court should grant the petition for writ of *certiorari* to resolve this conflict.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE ISSUE OF WHEN AN UNCONSTITUTIONAL ACT IS EXEMPT FROM THE NO INTEREST RULE NEEDS TO BE CLARIFIED BY THIS COURT

In *United States v. United States Shoe Corporation*, this Court held that the harbor maintenance tax ("HMT") as it applied to exports violated the Export Clause of the United States Constitution. 523 U.S. 360, 370 (1998) ("*U.S. Shoe*

I"). That decision, however, only provided for a partial refund of the money paid under the HMT. As a result, although U.S. Shoe and others who paid the HMT on exports received a partial refund of money paid, they have not received the full refunds, including interest, to which they are entitled.

A. The Constitution Overrides The Government's Immunity From Interest

This Court has previously held that "[a]part from constitutional requirements, in the absence of specific provision by contract or statute, or express consent * * * by Congress, interest does not run on a claim against the United States. The 'constitutional requirement' arises in a taking under the Fifth Amendment." *Shaw*, 478 U.S. at 317 and n.5 (ellipses in original) (internal quotation marks omitted).

In previously holding that the Government lacks immunity from interest when it violates the Takings Clause, the Supreme Court has used a rationale that applies to violations of all constitutional provisions:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature

> of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States.

Jacobs v. United States, 290 U.S. 13, 16 (1933). This Court in *Jacobs*, therefore, reasoned that statutory or contractual waiver of immunity from interest is unnecessary when the Government violates the Takings Clause simply because that clause is in the U.S. Constitution and imposes a duty to pay.

This Court's *dicta* from other cases also supports this view. *See United States v. Louisiana*, 446 U.S. 253, 264-65 (1980) ("Apart from constitutional requirements, in the absence of specific provision by contract or statute, or 'express consent * * * by Congress,' interest does not run on a claim against the United States.") (ellipsis in original); *see also Smyth v. United States*, 302 U.S. 329, 353 (1937) ("The rule is established that in the absence of contract or statute evincing a contrary intention, interest does not run upon claims against the government even though there has been default in the payment of the principal. The allowance of interest in eminent domain cases is only an apparent exception, which has its origin in the Constitution.") (emphasis added).

This Court's *dicta* in other cases, however, indicate that the Takings Clause is the only

constitutional provision the violation of which provides for interest. *See United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951) ("[I]nterest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract. * * * The only exception arises when the taking entitles the claimant to just compensation under the Fifth Amendment. Only in such cases does the award of compensation include interest."); *see also Shaw*, 478 U.S. at 317 & n.5; *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 47 (1928) ("We start with the rule that the United States is not liable to interest except where it assumes the liability by contract or by the express words of a statute, or must pay it as part of the just compensation required by the Constitution.").

Despite such *dicta*, this Court has never held that only violations of the Takings Clause waive sovereign immunity. The Federal Circuit went too far in its narrow interpretation of *Shaw*, and this Court should grant the petition for a writ of *certiorari* to clarify the language in *Shaw* referring to the U.S. Constitution requiring the payment of interest.

B. The Export Clause Is A Constitutional Provision That Mandates The Waiver Of Sovereign Immunity

The Export Clause of the U.S. Constitution states that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art. I, sec, 9,

cl. 5. In *U.S. Shoe I*, this Court held that the HMT as it applied to exports violated the Export Clause. *U.S. Shoe I*, 523 U.S. at 370. The Export Clause, therefore, is a constitutional provision which allows for the waiver of sovereign immunity and entitles those who paid the HMT on exports to interest in order to be fully compensated for the unconstitutional act by the United States.

The Federal Circuit held that the Export Clause was inapplicable as a constitutional provision providing for the waiver of sovereign immunity because the clause does not mention "just compensation." *U.S. Shoe II*, 296 F.3d at 1384-86. Carrying the Federal Circuit's analysis to its logical conclusion would mean that U.S. Shoe and other similarly situated companies would not even have been entitled to the refunds of the principal of the unconstitutional HMT.

Furthermore, in a different case, the United States Court of Federal Claims held that the United States owed a refund with interest to federal judges whose salaries were unconstitutionally reduced by social security taxes. *Hatter v. United States*, 38 Fed. Cl. 166, 181-83 (1997). In its opinion, the court reasoned:

> Resolution of the interest issue should not turn on whether the term "compensation" means the same thing in the Just Compensation Clause as in the Compensation Clause. Rather, the common denominator is that both clauses

> are contained in the Constitution. We find no principled basis to distinguish the constitutionally based entitlement to interest of takings plaintiffs from the constitutional position of federal judges. Both the Fifth Amendment and Article III affirmatively require the payment of compensation. If recompense for delay in compensation is required for takings claimants despite the general rule, surely the federal judge whose constitutionally protected compensation is delayed is at least equally entitled to such recompense.

Id. at 182 (emphasis added).

The Federal Circuit distinguished *Hatter* from *U.S. Shoe II* by stating that "[t]he construction of the Export Clause differs from the Compensation Clause" because "the word 'compensation' does not appear" in the Export Clause. *U.S. Shoe II*, 296 F.3d at 1385. The Federal Circuit ignored the obvious fact that other clauses in the U.S. Constitution require compensation by the Government, even though the word "compensation" does not appear in those clauses. *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 51-52 (1990) (holding unanimously that the Due Process Clause gives rise to a requirement for compensation in the context of an unlawful tax statute). The Export Clause, like the Takings and Compensation Clauses, is a constitutional provision that waives sovereign immunity for the purpose of requiring the Government to fully compensate victims for its

violation.

Without interest, U.S. Shoe and others who paid the unconstitutional tax on exports will never be put in as good a position as if the unconstitutional tax had never been collected from them. The Federal Circuit, in *U.S. Shoe II,* too narrowly interpreted a constitutional provision's waiver of sovereign immunity, and this Court should grant the petition for writ of *certiorari* to clarify when the U.S. Constitution overrides the no interest rule of *Shaw*.

CONCLUSION

For these reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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